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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

ELAINE M. KITOWSKI, as Personal Representative of **THE ESTATE OF LEE WILLIAM MIRECKI,** deceased,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

A. WHETHER THE *FERES* DOCTRINE APPLIES IN A FEDERAL TORT CLAIMS ACTION WHEN THE ACTS CAUSING DEATH ARE SO EGREGIOUS THAT THEY GO "BEYOND THE BOUNDS OF HUMAN DECENCY"

B. WHETHER AIRMAN RECRUIT LEE WILLIAM MIRECKI WAS EFFECTIVELY DISCHARGED FROM THE NAVY AT THE TIME OF HIS DEATH

C. WHETHER THE *FERES* DOCTRINE SHOULD BE OVERRULED

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STATEMENT AS TO JURISDICTION

Pursuant to 28 U.S.C. § 1254, the Supreme Court has the power to review a final judgment of a federal court of appeals. On May 29, 1991, the United States Court of Appeals, Eleventh Circuit, issued its final order affirming the district court's dismissal of Petitioner's cause of action.

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment:

No persons shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; *nor be deprived of life, liberty, or property, without due process of law;* nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

I. STATEMENT OF THE FACTS

The facts of this case are not in dispute.[1] On May 29, 1987, Airman Recruit Lee William Mirecki enlisted in the United States Naval Reserve under the Delayed Entry/Enlistment Program, and entered active duty with the Navy on September 21, 1987. He signed a Five Year Obligor School Guarantee Program agreement which guaranteed him specialized training as an Aviation Anti-Submarine Warfare Operator (hereinafter AW). According to the agreement, if Mirecki became ineligible to continue the specialized training, he could choose between reassignment to a program for which he was qualified, or separation from the Navy.

After completing recruit training, Mirecki reported to the Naval Aircrew Candidate School in Pensacola, Florida. The next day, November 24, 1987, the Navy informed him, for the first time, that the Rescue Swimmer School (RSS) at the Naval Air Station was a part of his specialized training. He then signed an agreement which gave him the right to drop the course on request. If he did, however, he would be disenrolled from the AW curriculum and waive any guarantee to further training as an AW. He then had the option under his contract to be reassigned, or leave the Navy without penalty.

After graduating from Aircrew Candidate School, Mirecki enrolled in RSS and began training on February 1, 1988. On February 3, Mirecki experienced difficulties with lifesaving procedures in a drill referred to as "sharks and daisies." During this two hour drill, students swam in a circle with their hands behind their backs. Instructors, who acted as panicking victims, grabbed the students in either a front or rear head hold. If the student correctly performed the release procedure, the student continued swimming in a circle and other instructors repeated the scenario. If the student failed to perform successfully, he was taken aside for intensive individual instruction.

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[1] *See Kitowski v. United States*, 5 FLW Fed. C882 (11th Cir. May 29, 1991).

Because of Mirecki's fear of being held while in the water, a fear that developed when he almost drown as a child when two boys held his head under water, he panicked and said he wanted to voluntarily withdraw from training, generally referred to as "drop-on-request" (DOR). The Navy permitted him to do so, because Mirecki's contract with the Navy guaranteed him the right. Mirecki then signed an acknowledgement of his intent to DOR stating that he was not willing to go back into the water. He stated he was scared to go through the class again.

Mirecki was then sent to undergo a series of counseling sessions and examinations. The primary purpose of these sessions was to evaluate Mirecki's physical and psychological ability to continue in RSS. At the end of the sessions, the counselors found Mirecki physically unqualified to return to the RSS course. Yet, Mirecki was mistakenly informed that he had the option to return. At first Mirecki refused to continue, but later he agreed to go back. The reason for his change of mind is because Mirecki was informed by instructors that if he withdrew from the RSS he would lose his aircrew status and his right to further advanced training, and he would be sent to a fleet in an undesignated status. In fact, the instructors themselves reminded Mirecki of the consequences of withdrawing from the training course through a series of counseling sessions that focused on the negative effects on a student's future assignments after a withdrawal. To Mirecki, this meant that if he withdrew from the swimming class, but did not choose under his contract to simultaneously withdraw from the Navy, his chances of advancement would be ruined, and his career would be reduced to years of manual labor as a boatswain's mate. Therefore, Mirecki told a friend that if he were unable to pass the swimming school the second time, he had no alternative but to withdraw from the Navy and return to civilian life.

Based on these facts, Mirecki re-enrolled in the RSS class. On March 2, 1988, at approximately 2:00 p.m., Mirecki and his classmates began the "sharks and daisies" lifesaving drill. At least two of the instructors present on this day knew of Mirecki's prior

problems: one had initialed the counseling sheet prepared when Mirecki first decided to drop-on-request and another had been the one working with Mirecki when he panicked in the earlier class.

Prior to the drill beginning, Mirecki was visibly shaking and stated he did not want to go in the pool or be there. Approximately fifteen (15) minutes into the drill, Mirecki had trouble performing the escape procedures and again began to panic. He grabbed the edge of the pool, stating he was tired and dizzy and wanted to quit. Three instructors forced him from the wall and took him to the center of the pool to continue with the exercise. Mirecki again failed to perform the procedure properly, and started showing extreme fear by swimming on his back, yelling "Help!, Help!," "I DOR," "I QUIT."

The instructors, however, did not let him go or terminate training, as Mirecki's contract provided. Instead, the instructors decided to perform an act on Mirecki known as "smurfing." This act involved the instructors forcibly holding a recruit under water until the recruit reached a semi-conscious state and started turning blue. A few of the instructors in the pool the day of Mirecki's death were experienced at this, having done it to several other recruits over the years. In fact, prior to the Mirecki incident, at least a half-dozen recruits had to be physically revived when the instructors decided to "smurf" them.

Thus, the act of "smurfing" began, and apparently once the act begins, no matter what a recruit did after that point, and no matter what he said, the recruit was not allowed to withdraw from the course, or the Navy, until the act was completed. Therefore, even though Mirecki was screaming for help, was screaming to quit, was screaming to DOR, and was screaming for his life, the instructors forced him back into a rear head-hold and into the water.

During the act, Mirecki was able to break free momentarily and swim to the pool side. He then climbed out, and removed some of his swimming equipment. Several instructors began to converge on

Mirecki. He crawled approximately five (5) feet to the stationary equipment rack and wrapped his arms around it. While holding onto the rack, Mirecki was in a state of panic and started shouting such statements as "I Quit," "I DOR," "Please Don't Put Me Back in the Water," "HELP!, HELP!."

At this time, one of the instructors directed the class, which had already been ordered out of the pool, to turn away from Mirecki and sing the "National Anthem" as loud as they could. The purpose of doing this was to prevent the students from hearing Mirecki scream and from seeing what was being done to him.

Mirecki was pulled from the rack and forced back into the pool but was able to break away again and grab the floating rope that divided the shallow end of the pool from the deep end. Several instructors again converged on him. When he refused to let go of the rope, one of the instructors swam to the side of the pool and released one end of the rope. Mirecki, however, continued to cling to it, and continued to plead to let him quit and DOR. Eventually, using a combination of dunking and prying Mirecki's hands, the instructors got him off the rope.

Mirecki was next put into a rear head-hold and dragged to the deep end of the pool where he was forced under water in 10-15 second intervals for an extended period of time. Mirecki was in a semi-conscious state at this point, and was starting to turn blue. Even though Mirecki was unable to perform any tasks at this point, the instructors continued to force Mirecki back under water in a rear head-hold. Eventually, Mirecki went totally unconscious, and an instructor on the pool deck gave the sign to get him out of the water.

When Mirecki was removed from the pool, he was unconscious, his lips and face were blue, and his eyes were rolled back in his head. Mirecki never regained consciousness. Mirecki was pronounced dead at 4:35 p.m.

The next day, three Navy men informed Mirecki's mother that Mirecki died in an accident. Two days later, Mirecki's body was

returned to Wisconsin for burial, accompanied by Petty Officer 1st Class David J. Smith, one of the instructors who was in the pool the day Mirecki died. Officer Smith was sent to Wisconsin to escort Mirecki's coffin at the funeral, and later to visit with the family. Over dinner at Mirecki's home, Officer Smith told the family that Mirecki died after simply failing to swim to the edge of the training pool during normal swimming classes. He said there was nothing out of the ordinary about the death. The Navy further released statements a day after Mirecki's death that provided the death was due to natural causes, and was simply accidental.

The family pursued the matter, however, because several students who were in the pool the day Mirecki died started leaving anonymous messages that the true story was not being released. Also, the family could not understand how a student in training could drown with seven instructors in and around the pool where the drowning occurred. Therefore, the family contacted several Congressmen in order to force an independent and complete investigation.

Finally, two-months after the incident and the Congressional investigation, the Navy confirmed that Mirecki's death was more than accidental. The Navy stated that Mirecki's death was diagnosed as heart failure brought on by extreme fright, fatigue, and lack of air. The government even admitted that the early statements to Mirecki's family, the press and the replies to Congressional inquiries were largely erroneous, not based on the results of any substantive investigation, and clearly misleading.

On January 25, 1990, Petitioner ELAINE KITOWSKI, as personal representative of the Estate of Lee Mirecki, filed a wrongful death action in the United States District Court, Northern District of Florida pursuant to the Federal Tort Claims Act, 28 U.S.C. § 1346(b). In response to the complaint, Respondent UNITED STATES OF AMERICA (hereinafter the Government) filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction arguing that Petitioner Kitowski's cause of action was barred by the doctrine enunciated in *Feres v. United States*, 340 U.S. 135 (1950). On August 9, 1990,

the district court judge ruled that Petitioner Kitowski's cause of action was bared under the *Feres* doctrine. Pursuant to 28 U.S.C. § 1291, Petitioner KITOWSKI timely challenged this ruling to the United States Court of Appeals, Eleventh Circuit. On May 29, 1991, the Eleventh Circuit affirmed the district court judge's opinion. The Eleventh Circuit specifically ruled that: (1) it had no power to overrule the *Feres* doctrine; (2) Mirecki was on active duty at the time of his death; and (3) it had no power to create an exception to the *Feres* doctrine for egregious conduct.

II. ARGUMENT FOR GRANTING THE WRIT

The Supreme Court may grant a writ of certiorari when "a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by the [Supreme Court]."[2] The instant case presents such a question because it is the first opportunity for the Supreme Court to decide whether the *Feres* doctrine bars a Federal Tort Claims Action when the government has performed an egregious and torturous act on a member of the military.

For the first time, this Court may answer the question whether the *Feres* doctrine grants immunity to the United States government when military superiors, through egregious conduct, kill a military recruit during peace time on United States soil. Previous cases before this Court have addressed this issue only in dicta. In these cases, five justices have implied that an exception should exist and that the issue would be addressed when the right case was presented.[3] It is submitted that Mirecki is the right case.

Based on the arguments presented below, Petitioner respectfully requests the Supreme Court accept certiorari and grant Mirecki the honor of having the highest court in the country redress his untimely death.

A. THE HISTORY OF THE *FERES* DOCTRINE

Under the common law, the United States government enjoyed the protection of the sovereign immunity doctrine.[4] Pursuant to this doctrine, a United States citizen injured in tort by a government

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[2]SUP. CT. R. 10.3.

[3]*See United States v. Stanley*, 107 S. Ct. 3054 (1987); *United States v. Johnson*, 107 S. Ct. 2063 (1987).

[4]*See Feres v. United States*, 340 U.S. 135, 139 (1950).

employee had the singular remedy of petitioning Congress to pass a private bill for relief.[5] Because these claims were absolutely barred absent such legislative consent, this unwieldy system eventually proved to be an inadequate method of handling tort claims against the government. In fact, by the 1930's, Congress had to rule on over 200 such bills each year.[6]

In an effort to "provide remedies for wrongful government actions through a waiver of sovereign immunity and to relieve Congress of the burden, and the public of the inequities, of private bills . . .," Congress enacted the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671-2680.[7] This Act allows civil actions against the United States for:

> personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while *acting within the scope of his office or employment,* under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.[8]

Prior to passing the FTCA, Congress considered at least eighteen tort claim proposals. All but two of these proposals expressly denied recovery to members of the armed forces.[9] Yet, when Congress

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[5]*Feres*, 340 U.S. at 140; RESTATEMENT (SECOND) OF TORTS § 895A, comment a (1979).

[6]Note, *The Effect of the Feres Doctrine on Tort Actions Against the United States By Family Members of Servicemen*, 50 FORDHAM L. REV. 1242, 1243 (1982) (citing H.R. Rep. No. 1287, 79th Cong., 1st Sess. 2 (1945)).

[7]*See Parker v. United States*, 611 F.2d 1007 (5th Cir. 1980).

[8]28 U.S.C. § 1346(b) (emphasis added).

[9]Mahoney, *United States v. Stanley: Has the Feres Doctrine Become a Grant of Absolute Immunity?* 23 NEW ENGLAND L. REV. 767, 775 n.80 (1988-89) (citing *Brooks v. United States* 337 U.S. 49, 51 (1949); H.R. 12178, 68th Cong., 2d Sess. (1925); H.R. 12179, 68th Cong., 2d Sess. (1925); S. 1912, 69th Cong., 1st Sess. (1925); H.R. 6716, 69th Cong., 1st Sess. (1926); H.R. 8914, 69th Cong., 1st Sess. (1926); H.R. 9285, 70th Cong., 1st Sess. (1928); S. 4377, 71st Cong.,

finally enacted the FTCA, it settled on specifically including members of the military within the Act. In fact, Congress included a specific definition in the Act to make it clear that "in the case of a member of the military . . . [the FTCA applies to those servicemen] acting in line of duty."[10] The only specific exception Congress provided to this rule was for a "claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, *during time of war.*"[11]

Subsequent to the passage of the FTCA, the Supreme Court chose to confront the issue as to whether military personnel could recover for injuries under the Act. In *Brooks v. United States*, 337 U.S. 49 (1949), two servicemen brought suit under the FTCA for serious and fatal injuries sustained when a United States Army truck negligently struck their automobile. The Supreme Court permitted the servicemen to assert a claim under the FTCA. The Court reasoned that because Congress considered eighteen versions of the bill between 1925 and 1935, and included within the Act specific detailed exceptions to it, [i]t would be absurd to believe that Congress did not have the servicemen in mind in 1946, when this statute was passed." *Id.* at 51. Thus, the Court concluded that if Congress had intended to absolutely bar servicemen from redress under the FTCA it would have stated so. The Court, however, declined to rule on the issue whether servicemen could recover under the FTCA if their injuries arose out of their military service and activity. *Id.* at 52.

In 1950, just one year after the *Brooks* decision, the Court addressed this issue. In *Feres v. United States*, 340 U.S. 135 (1950),

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2d Sess. (1930); H.R. 15428, 71st Cong., 3d Sess. (1931); H.R. 16429, 71st Cong., 3d Sess. (1931); H.R. 17168, 71st Cong., 3d Sess (1931); H.R. 5065, 72nd Cong., 1st Sess. (1932); S.211, 72nd Cong., 1st Sess. (1932); S. 4567, 72nd Cong., 1st Sess. (1932); S. 1833, 73rd Cong., 1st Sess. (1933); H.R. 129, 73rd Cong., 1st Cong. 1st Sess (1933); H.R. 8561, 73rd Cong., 2d Sess. (1934); H.R. 2028, 74th Cong., 1st Sess. (1935); S. 1043, 74th Cong., 1st Sess. (1935)).

[10]28 U.S.C. § 2671

[12]28 U.S.C. § 2680(j) (emphasis added).

the Court consolidated three separate and independent cases in order to resolve the question. The first case, *Feres v. United States*, 177 F.2d 535 (2d Cir. 1949), *aff'd*, 340 U.S. 135 (1950), was an action for negligence brought under the FTCA for the death of Rudolf J. Feres, a serviceman on active duty who died in a barracks fire. The second case, *Jefferson v. United States*, 74 F. Supp. 209 (D. Md. 1947), involved an army surgeon's malpractice in leaving a thirty-by-eighteen inch towel in Arthur K. Jefferson's stomach during an operation he was required to undergo while in the service. The third case, *Griggs v. United States*, 178 F.2d 1 (10th Cir. 1949), *rev'd*, 340 U.S. 135 (1950), also involved an action brought under the FTCA for medical negligence.

The Court stated that the issue presented in all three cases was whether the FTCA was meant to remedy an injury sustained by a serviceman in the course of military service, which under other circumstances, would be an actionable wrong. *Feres*, 340 U.S. at 138. After an analysis of the facts, the Court held that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries *arise out of or are in the course of activity incident to service.*" *Id.* at 146 (emphasis added). In reaching its decision, the Court relied on three rationales.

The first rationale, termed the "parallel private liability" rationale, or the "novel and unprecedented liability" rationale, recognized that, under the FTCA, the United States could only be liable "in the same manner and to the same extent as a private individual under like circumstances." *Feres*, 340 U.S. at 141. The Court noted that no parallel private liability could exist in an active military situation since no American law has ever "permitted a soldier to recover for negligence against either his superior officers or the government he is serving." *Id.* Additionally, the Court stated that there could be no liability "under like circumstances" since "no private individual has power to conscript or mobilize a private army." *Id.* Finding no theory of private liability "even remotely analogous" to negligence actions brought by soldiers against their superior officers, the Court concluded that "in the absence of express

congressional command," Congress did not intend to waive immunity for service-connected injuries and make a "radical departure from established law." *Id.* at 141, 146.

The second rationale the Court relied upon was its belief that the "distinctively federal" relationship between the United States and its enlisted military personnel would be undermined if the federal government was exposed to local and geographically diverse tort laws as applied under the FTCA. *Feres*, 340 U.S. at 143. The Court thought it made no sense to permit the fortuity of the situs of the alleged negligence to affect the liability of the Government to the serviceman. The Court further believed "[i]t would hardly be a rational plan of providing for those disabled in service . . . [if their recovery was] dependent upon geographic considerations over which they have no control. . . ." *Id.* at 142-43. *See also United States v. Johnson*, 107 S. Ct. 2063, 2067 (1987); *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 672 (1977).

The third rationale for the *Feres* doctrine focused on the existence of the Veterans Benefits Act (VBA),[12] a compensation system for injured military personnel. *Feres*, 340 U.S. at 144-45. This Act provides compensation to any veteran injured in the line of duty,[13] and pays death benefits to the surviving spouse or children of any veteran who dies as the result of injury incurred in the line of duty.[14] The *Feres* Court thought it unlikely that Congress intended to permit additional recovery under the FTCA over and above that provided in the VBA. Thus, the Court found that the VBA was an exclusive remedy. *Id.* at 146. *See also Johnson*, 107 S. Ct. at 2068-69.

Four years later in *United States v. Brown*, 348 U.S. 110 (1954), the Court recognized a fourth rationale for Feres. This rationale emphasizes the peculiar and special relationship of the soldier to his

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[12] 38 U.S.C. §§ 101-5228

[13] 38 U.S.C. § 331.

[14] 38 U.S.C. § 341.

superiors and the effects of the maintenance of such suits on military discipline. In *Brown*, an honorably discharged veteran brought suit against the United States under the FTCA for the negligent post-service medical treatment of a service connected disability provided by a veterans hospital. The Court held that because Brown sustained his subsequent injury after his discharge, he was not barred by *Feres* and could sue under the FTCA. *Id.* at 113. The Court reasoned that his civilian status at the time of the injury in question precluded the injury's classification as one arising out of military activity. *Id.* at 112.

The Court, however, stressed that Congress did not intend the FTCA to "cover injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." *Id.* at 112 (emphasis added). The Court stated that if servicemembers could bring suit alleging negligence against other servicemembers, military discipline would be undermined and civilian courts would be required to second-guess military decision making. Specifically, the Court asserted:

> The peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for *negligent* orders given or *negligent* acts committed in the course of military duty, led the [*Feres*] Court to read that Act as excluding claims of that character.

Id. at 112 (emphasis added).

B. APPLICATION OF THE LAW TO FACTS

Today, anytime a court is faced with the possibility *Feres* might apply, the court must determine whether the individual bringing the suit was injured "incident to service". Although this initially might seem an easy task, the problem arises when the court attempts to determine what "incident to service" means. Even the Supreme

Court has admitted that there is no universal definition for the phrase "incident to service," and that the "*Feres* doctrine cannot be reduced to a few brightline rules. . . . [Instead], each case must be examined in light of the [facts]." *United States v. Shearer*, 473 U.S. 52, 57 (1985).

The facts of the instant case are one of first impression. The Supreme Court has never been presented with the following question: "Does the *Feres* doctrine apply in a Federal Tort Claims Action when the acts causing death are so egregious and torturous that they go 'beyond the bounds of human decency'"? The only case even close to being on point is *United States v. Stanley*, 107 S. Ct. 3054 (1987). However, as shown below, there is a significant difference between *Stanley* and the instant case. *Stanley* was brought under a *Bivens* action, whereas the instant case is a Federal Tort Claims Action. Plaintiff submits that based on the arguments below, *Feres* should not apply in an FTCA action when the facts causing injury are egregious and torturous.

(i) EGREGIOUS NATURE OF FACTS PREVENT *FERES* FROM APPLYING

In *Stanley*, James B. Stanley, a master sergeant in the Army, volunteered to participate in a program designed to test the effectiveness of protective clothing and equipment as a defense against chemical warfare. He was released from his duties and sent to the Army's Chemical Warfare Laboratories in Maryland for a one month period. During the month, Stanley was administered doses of lysergic acide diethylamide (LSD) on four separate occasions pursuant to an Army plan to study the effects of the drug on human subjects. Twelve years later, Stanley began complaining that the four doses of LSD caused him to suffer personality changes which resulted in his discharge from the military and his divorce. Over fifteen years after the incident, Stanley filed a Bivens action[15] against the military

[15]*Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) (creating a cause of action for monetary damages against six agents

personnel responsible for administering the LSD.[16] In a 5-4 decision, the Supreme Court denied the *Bivens* action applying a *Feres* type rationale.

Although the *Stanley* case appears, on first reading, to bar FTCA causes of action based on egregious factual scenarios, *Stanley*, along with a predecessor case, actually stands for the opposite conclusion. The *Stanley* decision merely provides that the *Feres* doctrine bars a *Bivens* action when the facts alleged are egregious. The *Stanley* decision does not provide that an FTCA cause of action, such as this one, will also be barred under egregious and torturous circumstances. On the contrary, the *Stanley* Court specifically discussed the difference between applying the *Feres* doctrine to a congressionally enacted cause of action, such as the FTCA, and a judicially created cause of action, such as *Bivens*. The *Stanley* Court emphasized that it judicially created the cause of action which is now known as *Bivens*.[17] Therefore, the Court ruled it could refuse to expand the action to include members of the military. The Court noted, however, that Congress enacted the Federal Tort Claims Act, and that the wording is unambiguous and unqualified in its application.[18] For this reason, the Court stated that it possessed much less power to create an exception.[19] In fact, Justice Scalia, who

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of the Federal Bureau of Narcotics who made a warrantless entry of plaintiff's home and arrested him without probable cause while acting under color of federal authority).

[16]Stanley had originally filed suit against the United States government under the Federal Tort Claims Act, but amended his complaint to proceed solely against the military personnel after several appeals on the issue.

[17]*Bivens*, 403 U.S. 388 (1971).

[18]*See Stanley*, 107 S. Ct. at 3062 & n.5.

[19]When Congress enacted the FTCA, it included a specific definition in the Act to make it clear that "in the case of a member of the military . . . [the FTCA applies to those servicemen] acting in line of duty." *See* 28 U.S.C. § 2671. The only specific exception Congress provided to this rule was for a "claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, *during time of war*." 28 U.S.C. § 2680(j) (emphasis added). If the Court rules that a member of the military has no right to bring a cause of action against the United States government for the egregious conduct of one of its employees, then the Court is,

authored the majority opinion in *Stanley*, wrote in a separate decision that *Feres* should never apply in an FTCA action, and that "*Feres* [as it applies to an FTCA action] was wrongly decided and heartily deserves the 'widespread, almost universal criticism' it has received."[20] The question which therefore arises in this case is whether *Feres* applies in an FTCA cause of action when a serviceman is injured by the egregious conduct of his superiors.

In *Stanley*, Justice O'Connor explained that there are some military acts and commands that are "so far beyond the bounds of human decency that as a matter of law" the acts cannot occur "incident to service," and "the very least that society can do is to see that the victims are compensated . . . ." *Stanley*, 107 S. Ct. at 3065 (O'Connor, J., dissenting). Otherwise, members of the armed forces, without legal authority and with no sufficient legitimate military or other purpose, could violate the following Acts without ever being held liable to the victims or being subject to prosecution, unless the government deemed proper: (1) the Universal Declaration of Human Rights; (2) the International Covenant on Civil and Political Rights; (3) the Geneva Convention; (4) the Declaration on the Protection of all Persons from Being Subjected to Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment; and (5) the Nuremberg Code.[21] This would, for all intents and purposes, bestow absolute immunity on all military officials, entitling them to intentionally and maliciously violate the constitutional rights of servicemen, without fear of retribution. *Stanley*, 107 S. Ct. at 3068-76 (Brennan, J., dissenting with Marshall, J., joining).

As Justice Brennan noted, the law cannot be such that the military has absolute immunity to perform any action they desire. The military must be liable when it knows, or should know, its actions violate

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in effect, avoiding the unambiguous and unqualified language of the act.

[20]*United States v. Johnson*, 107 S. Ct. 2063, 2074 (1987) (Scalia, J. dissenting, with Brennan, J., Marshall, J., and Stevens, J., joining).

[21]*Hinkie v. United States*, 715 F.2d 96, 98 n.3 (3d Cir. 1983) (citing *Jaffee v. United States*, 663 F.2d 1226, 1248-50 (3d Cir. 1981) (Gibbons, J., dissenting), *cert. denied*, 456 U.S. 972 (1982)).

the serviceman's clearly established constitutionally protected rights. This is the only way to balance the "need to protect officials who are required to exercise their discretion" against the need to provide a damage remedy in deterring federal officials from committing constitutional wrongs against citizens. *Stanley*, 107 S. Ct. at 3070 (Brennan, J., dissenting).

This fact is so well recognized that even under the common law, military superiors received no exemption from the general rule that officials may be held accountable for intentional, malicious actions. As an example, in *Wilkes v. Dinsman*, 7 How. 89, 48 U.S. 89, (1849), the Court permitted a Navy seaman to bring a claim against his superior officer for injuries resulting from willful torts. Although the Court suggested that the commander was entitled to a jury charge providing some immunity, it refused to confer absolute immunity from liability for intentional torts. The Court stated:

> It must not be lost sight of . . . that, while the chief agent of the government, in so important a trust, when conducting with skill, fidelity, and energy, is to be protected under mere errors of judgment in the discharge of his duties, . . . he is not to be shielded from responsibility if he acts out of his authority or jurisdiction, or inflicts private injury either from malice, cruelty, or any species of oppression, found on consideration independent of public ends.
> The humblest seaman or marine is to be sheltered under the aegis of the law from any real wrong, as well as the highest in office.

7 How. at 123, 48 U.S. at 123.

In addition, if the court rules that a serviceman does not have the right to recover for injuries he receives because of the egregious conduct of his superiors, then the Court is completely denying the serviceman constitutional rights provided to civilians. The law cannot be such that citizens forfeit their constitutional rights by enlisting

in the armed forces.[22] This is especially true in light of the fact that the Supreme Court has held that federal prisoners can sue the federal government under the FTCA to recover damages for personal injuries sustained during confinement in a federal prison and resulting from the negligence of a governmental employee.[23] Are the courts really willing to hold that prisoners have more constitutional rights than individuals serving in our armed forces? As former Chief Justice Earl Warren had occasion to note: "our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes." Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 188 (1962).

Based on the foregoing, it is understandable why Justice O'Connor, Justice Brennan and Justice Marshall have advocated an exception to the *Feres* doctrine when the facts are such that injury arises out of the egregious conduct of superiors,[24] and it is equally understandable why Justice Scalia and Justice Stevens have recommended that *Feres* be overruled altogether in FTCA causes of action.[25] Considering that Justice O'Connor, Justice Marshall, Justice Scalia, Justice Stevens, and former Justice Brennan appear to agree that *Feres* doesn't apply under an egregious FTCA factual scenario, and considering that Justice Kennedy and Justice Souter have not had the opportunity to address the issue, this Court should accept certiorari and look at the egregious facts in this case to determine if *Feres* should apply.

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[22]Mahoney, *United States v. Stanley: Has the Feres Doctrine Become a Grant of Absolute Immunity?*, 23 NEW ENGLAND L. REV. 767, 811 (1988-89) (quoting *United States v. Tempia*, 16 U.S.C.M.A. 629, 633, 37 C.M.R. 249, 253 (1967) ("The time is long since past . . . when this Court will lend an attentive ear to the argument that members of the armed forces are, by reason of their status, *ipso facto* deprived of all protections of the Bill of Rights.")

[23]*United States v. Muniz*, 374 U.S. 150 (1963).

[24]*Stanley*, 107 S. Ct. at 3065-3077 (O'Connors, J., Brennan, J., Marhsall, J., dissenting).

[25]*Johnson*, 107 S. Ct. at 2074 (Scalia, J., dissenting with Stevens, J., joining).

Plaintiff anticipates that the Government will argue that this Court should not accept certiorari because the Court should not become involved in acts occurring in the military. The Government will likely argue that suits against the military involve the judiciary in-sensitive military affairs at the expense of military discipline and effectiveness, and that the vigor of military decision making will be hindered if damages are awarded for incorrect choices.

However, the Court must recognize that military affairs are subject to scrutiny, and that military decisions are second-guessed, every time a civilian, who is not subject to the *Feres* doctrine, sues a military official. Yet in these cases, there is never any mention of interfering with military discipline.[26] Equally important is Justice Scalia's insight that:

> [i]t is strange that Congress' "obvious" intention to preclude *Feres* suits because of their effect on military discipline was discerned neither by the *Feres* Court nor by the Congress that enacted the FTCA (which felt it necessary expressly to exclude recovery for combat injuries). Perhaps Congress recognized that the likely effect of *Feres* suits upon military discipline is not as clear as we have assumed, but in fact has long been disputed. . . . Or, perhaps Congress assumed that the FTCA's explicit exclusions would bar those suits most threatening to military discipline. . . . Or perhaps—most fascinating of all to contemplate—Congress thought that *barring* recovery by servicemen might adversely affect military discipline. After all, the morale of a [serviceman] . . . will not likely be boosted by news that his widow and children will receive only a fraction of the amount they might have recovered had the [serviceman]

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[26] *Bridgeford v. United States*, 550 F.2d 978, 979-80 (4th Cir. 1977) (retired military officer's dependent injured as a result of medical malpractice); *Williams v. United States*, 435 F.2d 804, 805 (1st Cir. 1970) (serviceman's child died after being refused admission to military hospital); *Jones v. United States*, 236 F. Supp. 756, 757-59 (E.D. N.C. 1964) (serviceman's wife injured in auto accident).

been piloting a commercial helicopter at the time of his death [rather than a military helicopter].

Johnson, 107 S. Ct. at 2073-2074. (Scalia, J., dissenting).

It must also be remembered that a soldier is not permitted to act upon the commands of his superior before first reflecting on the lawfulness of the order. As the military court in *United States v. Calley*, 22 U.S.C.M.A. 534, 541, 48 C.M.R. 19, 26 (1973) stated, "the obedience of a soldier is not the obedience of an automaton. A soldier is a reasoning agent, obliged to respond, not as a machine, but as a person."[27] If a soldier fails to act in a lawful manner, he may be prosecuted for war crimes perpetrated under the rubric of obedience to orders.[28]

In addition, because this lawsuit is against the Government, and not the individuals causing injury, there really isn't a fear that individual decision making is going to be hindered. For example, in *Owens v. City of Independence*, 100 S. Ct. 1398 (1980), the Supreme Court held that a city was not immune from liability under 42 U.S.C. § 1983, even though the individual officials were. The Court stated that the rationale relied upon for the creation of individual immunity "is less compelling, if not wholly inapplicable, when the liability of the municipal entity is at issue." *Owens*, 100 S. Ct. at 1416. In the first instance, liability "could have an undue chilling effect on the exercise of [officials'] decision making responsibilities," while in the second instance, "no such pernicious consequences were likely to flow from the possibility [of liability] from public funds." *Id.* at 1417 n.37. In sum, suits against individuals have a far greater potential for chilling responsible decision making than those against

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[27]Mahoney, *United States v. Stanley: Has the Feres Doctrine Become a Grant of Absolute Immunity?*, 23 NEW ENGLAND L. REV. 767, 810 (1988-89) (quoting *United States v. Calley*, 22 U.S.C.M.A. 534, 48 C.M.R. 19 (1973)).

[28]Mahoney, *United States v. Stanley: Has the Feres Doctrine Become a Grant of Absolute Immunity?*, 23 NEW ENGLAND L. REV. 767, 810 (1988-89) (quoting *Calley*, 22 U.S.C.M.A. at 541-44, 48 C.M.R. at 26-29 (defendant could not rely

the government. *Jaffee v. United States*, 663 F.2d 1226, 1234 (3d Cir. 1981), *cert. denied*, 456 U.S. 972 (1982).

The Court should also reject the Government's anticipated argument that the judiciary is unable to question military decisions. Like all aspects of a democratic society there must be a system of checks and balances over each governmental branch. We must remember that military personnel have not always been able to monitor themselves and maintain an effective, yet just, system. For example, between 1945 and 1963, an estimated 250,000 military personnel were exposed to large doses of radiation while engaged in maneuvers designed to determine the effectiveness of combat troops in nuclear battlefield conditions. Soldiers were typically positioned one to three miles from nuclear detonation. The soldiers were issued no protective clothing, although Atomic Energy Commission personnel were, nor were the soldiers warned as to the possible dangers of radiation. The soldiers were merely instructed to cover their eyes. At detonation the soldiers "could see the bones in their forearms." *Stanley*, 107 S. Ct. at 3068 n.6 (citing Schwartz, *Making Intramilitary Tort Law More Civil: A Proposed Reform of the Feres Doctrine*, 95 YALE L.J. 992, 994 n.16 (1986)).

The Court must recognize that the only way to assure that basic constitutional guarantees will be protected when national security is involved is for the court to be willing to question military decisions. *Butz v. Economou*, 438 U.S. 478 (1978). As the Court stated in *Mitchell v. Forsyth*, 472 U.S. 511 (1985), "it is far more likely that actual abuses will go uncovered [when national security is involved] than . . . abuses will give rise to unfounded and burdensome litigation." *Id.* at 522. When national security is involved, there is always a "danger that high federal officials will disregard constitutional rights in their zeal to protect the national security." *Id.* at 523.

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on obedience to superiors' orders where he should have known that order to kill civilians was illegal); *United States v. Kinder*, 14 C.M.R. 742, 770-73 (1954) (obedience to orders no defense where soldiers executed order to shoot subdued prisoner at South Korean airbase).

The simple truth is that the military is sometimes unable to monitor itself, and correct its own problems, and in fact, is willing to purposely cover-up the truth. "Smurfing" went on for years until the Mirecki family convinced Congress to conduct an independent investigation. There must be a system of checks and balances. It is simple logic that you don't allow the individuals denying constitutional rights to be the sole judge of their actions. This is the very reason we have court systems, and the very reason Congress enacted the FTCA. As Justice Robert H. Jackson stated when referring to the Nuremberg trials "[t]o expect the Germans to bring these Germans to justice was out of the question." W. HARRIS, TYRRANY ON TRIAL at xxxi (1954).

Feres has been widely criticized for over forty years. The time has arrived to address the final and remaining issue regarding the controversial doctrine. Mirecki at least deserves the honor of having the United States Supreme Court address his case.

(ii) MIRECKI WAS EFFECTIVELY DISCHARGED AT THE TIME OF HIS DEATH

The Court should also accept certiorari in this case in order to determine whether Mirecki was on "active duty" at the time of his death. For if Mirecki was not on active duty, then *Feres* is inapplicable. *Harvey v. United States*, 884 F.2d 857 (5th Cir. 1989); *Adams v. United States*, 728 F.2d 736 (5th Cir. 1984); *Bankston v. United States*, 480 F.2d 495 (5th Cir. 1973).

As stated in the fact section in this petition, when Mirecki enlisted in the Navy on May 29, 1987, he signed a contract which guaranteed him specialized training as an AW. According to the agreement, if Mirecki became ineligible to continue the specialized training, he could freely choose to either be reassigned to a program that had a vacancy for which he was qualified, or be separated from the Navy.

Six months later, Mirecki reported to Naval Aircrew Candidate School at Pensacola, Florida, where he was informed for the first

time that the Rescue Swimmer School (RSS) was a part of his specialized training. He then signed an agreement which gave him the right to drop the course on request. If he did, however, he would be disenrolled from the AW curriculum, and would then have to make the decision whether to be reassigned within the Navy or voluntarily withdraw.

Prior to his death, Mirecki had made his intentions absolutely clear that he would choose the latter. Specifically, prior to his death, Mirecki was counseled on several occasions on the negative effects on a student's future assignments after a withdrawal. Mirecki was informed that if he withdrew from the swimming class, but did not choose under his contract to simultaneously withdraw from the Navy, his chances of advancement would be ruined, and his career would be reduced to years of manual labor as a boatswain's mate. Just prior to his death, Mirecki even told his friends that if he were unable to pass the swimming school, he had no alternative but to withdraw from the Navy and return to civilian life.

When Mirecki rejoined the class on March 2, 1988, his fears quickly overtook him when the course began. He rolled onto his back in the water and started yelling "I quit," "I DOR," "please don't put me back in the water," "HELP!, HELP!." The instructors, however, did not let him go or terminate training, as Mirecki's contract provided. Instead, the instructors decided to perform the act of "smurfing." During this act, Mirecki was clearly in a state of panic, shouting "I quit," and "I DOR." Yet the instructors refused to honor Mirecki's contracts, and let him withdraw from the course. Instead, the instructors converged on Mirecki and started forcing him in head-holds and dunking him under water, until eventually Mirecki went unconscious and died.

Based on these facts, it is clear that Mirecki was trying to withdraw from the Navy at the time of his death, a right he had pursuant to the contracts he signed when entering the Navy and the RSS course. Under these contracts, Mirecki had a unilateral right to withdraw

from the swimming course and the Navy upon the simple request to do so. This right was not contingent on any factors besides Mirecki's intent to quit.

For this reason, Plaintiff submits that Mirecki was effectively discharged at the time of his death. As support for the argument, Plaintiff cites to *Bankston v. United States*, 480 F.2d 495 (5th Cir. 1973). In *Bankston*, the decedent, just prior to his formal discharge from the Army, was injured in an automobile accident. The accident occurred on the exact day the serviceman was to be discharged from the service. He was treated in the United State Public Heath Service Hospital in New Orleans, where he subsequently died because of hepatitis which he caught as the result of a negligent blood transfusion. The former Eleventh Circuit concluded that there was a "factual issue whether the serviceman had been discharged from military service at the time of the claimed negligence . . . ." *Id.* at 495. The court specifically held that "the controlling fact in the case at bar is whether . . . [Bankston's] *status was tantamount* to being discharged for the purpose of asserting this claim." *Id.* at 497 (emphasis added). The case was remanded to the trial judge to make the determination as to whether the serviceman was injured incident to service, or whether he had been effectively discharged from the armed services prior to incurring his injury. *Id.* at 498.

The Government will likely argue that Plaintiff has no direct proof of Mirecki's intent to withdraw from the Navy at the time of his death, and thus, cannot assert that Mirecki's status was tantamount to being discharged. The government is correct on one point. Plaintiff has no direct proof of Mirecki's intent. The Government prevented the Plaintiff from ever obtaining this proof when the Government took Mirecki's life.

The Government should obviously not receive the benefit of having the Court hold that Mirecki's intent is now undiscernible. More important, Plaintiff doesn't have to present direct evidence of Mirecki's intent for the Court to conclude that Mirecki was attempting to withdraw from the Navy at the time of his death. This

is because the circumstantial evidence in this case is overwhelming. Mirecki was in a state of panic just prior to his death. He was being forced under water, he was losing consciousness, and he was turning blue because of lack of oxygen. Mirecki was trying to do anything he could to get out of the situation he was in. He obviously knew that the only sure way was to withdraw from the Navy altogether, otherwise, the instructors holding him underwater would still be his superiors. Thus, he started yelling, "I Quit!" "I Quit!" These words are clear when considering the state of panic Mirecki was in at the time. Moreover, Mirecki had told his friends just prior to his death that he would withdraw from the Navy if he could not finish the "AW" training program on this attempt.

Based on the foregoing, the Court should accept certiorari and find that Mirecki was effectively discharged at the time of his death. It would be unjust for the Government to be able to argue that if it physically prevents an individual from being discharged at the moment that he attempts to withdraw, and has the automatic right to, that the individual is not effectively discharged. If this were not true, then the Government could theoretically attempt to deter discharges by shooting every serviceman who appeared to sign his discharge papers, and then argue the Feres doctrine barred recovery because the serviceman was "active duty" at the time of his death.

(iii) *FERES* SHOULD BE OVERRULED

The final reason to accept certiorari in this case is for the Court to decide whether the time has come to reconsider the *Feres* doctrine.

Due to the uncertainty as to how courts should interpret the phrase "incident to service," and because of the various tests implemented by judges throughout the country, federal courts all over the country are constantly reaching "unjust" decisions in FTCA decisions involving some relation, no matter how remote, to the military. For example, in *Flowers v. United States*, 764 F.2d 759 (11th Cir. 1985), a serviceman was barred from seeking recovery under the FTCA when a military bus collided with him on a state road running across

federal property while the serviceman was off-duty and driving his personal vehicle. *See also Del Rio v. United States*, 833 F.2d 282 (11th Cir. 1987) (an infant was found capable of recovering damages against a Navy doctor for injuries received during child birth; yet the mother, who also suffered injuries during the birth as a result of the same negligence, was not able to seek recovery).

As stated at the beginning of this brief, Congress considered at least eighteen tort claim proposals between 1925 and 1935 prior to enacting the FTCA. All but two of these proposals expressly denied recovery to members of the armed forces. Yet, after all these various proposals, Congress settled on specifically including members of the military within the FTCA. In fact, Congress included a special definition in the Act to make it clear that "in the case of a member of the military . . . [the FTCA applies to those servicemen] acting in line of duty."[30] The only exception Congress provided to this rule for military personnel was for a "claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, *during time of war*."[31]

This sequence of events demonstrates that Congress specifically considered, and provided what it thought needful for, the special requirements of the military." *Johnson*, 107 S. Ct. at 2070. (Scalia, J., dissenting). In fact, the Supreme Court itself has stated that "[i]t would be absurd to believe that Congress did not have the servicemen in mind" when passing the FTCA. *Brooks*, 337 U.S. at 51.

The language of the FTCA shows that Congress intended the United States to be held liable to all persons, including servicemen, injured by the negligence of government employees. The time has come to reconsider an inequitable doctrine.

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[30]28 U.S.C. § 2671

[31]28 U.S.C. § 2680(j) (emphasis added).

III. CONCLUSION

The last words Lee Mirecki ever heard was the singing of the "National Anthem," a song which praises our forefathers for their bravery and courage in fighting for our freedom, which among these is our right to life. Lee Mirecki's death does not have to be just another military statistic. This Court has the power to allow Mirecki to be remembered as the recruit whose death helped to create equal rights for our military personnel. Plaintiff prays that Lee Mirecki did not die in vain, and that this Court will permit him the honor to present his case before the highest court in the country.

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Elaine M. KITOWSKI, as Personal Representative of the Estate of Lee William Mirecki, deceased, Plaintiff-Appellant,

v.

UNITED STATES of America, Defendant-Appellee.

No. 90-3744

United States Court of Appeals, Eleventh Circuit.

May 29, 1991

This is a suit under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671-80 (1988), by the mother of a Navy enlisted man who died during a training exercise. The complaint sought damages for wrongful death. The district court determined that it lacked subject matter jurisdiction and dismissed the action. The district court reached this conclusion by applying the holding in *Feres v. United States*, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950), which states that the FTCA does not permit claims for injuries to active duty military personnel that "arise out of or are in the course of activity incident to service." *Id.* at 146, 71 S.Ct. at 159.

On appeal the Plaintiff argues that the *Feres* doctrine does not bar an action under the FTCA when the acts causing injury to active duty military personnel are "egregious." Finding no authority for such an exception to *Feres*, we affirm.

I.

The facts are not in dispute. Lee Mirecki was an Airman Recruit in the United States Navy. He died on March 2, 1988, while

participating in sea rescue training at the Naval Air Station, Pensacola, Florida. Mirecki enlisted in the Navy and entered active duty in 1987. Under his enlistment contract, he was guaranteed specialized training as an Aviation Anti-Submarine Warfare Operator (AW). According to this agreement, if Mirecki became ineligible to continue the specialized training due to some personal fact of which he was unaware, he could choose either to be reassigned to another program or to be separated from the Navy.

As part of this specialized training as an AW, Mirecki was required to complete a program at the Rescue Swimmer School (RSS) at the Naval Air Station in Pensacola. Before beginning the course at the RSS, he signed an agreement that permitted him to drop the course on request at any time, generally referred to as "drop-on-request" or "DOR." If he dropped the course, he would no longer be eligible for AW training and would have to decide at that time whether he wished reassignment or discharge from the Navy. The RSS program involved rigorous training to prepare recruits for retrieving downed aircraft carrier-based airmen under wartime conditions.

As part of the RSS program, the recruits must participate in a drill known as "sharks and daisies," in which students, wearing only swim fins and no safety equipment, swim in a circle with their hands behind their backs. Instructors grab the students in either a front or rear head hold in an attempt to simulate panicking victims in need of rescue. If a student correctly performs the release procedure, he continues swimming in a circle and other instructors repeat the scenario. If a student fails to perform the maneuver correctly, he is given additional instruction.

Mirecki had a fear acquired in childhood of being held under the water, and this fear prevented him from succeeding in the sharks and daisies drill. In February 1988 Mirecki was unable to complete the drill and voluntarily withdrew from the RSS. At that time, he underwent a series of physical and psychological exams and was placed on "medical hold." Soon thereafter, Mirecki exercised his

option to return to the RSS program, allegedly because of pressure from RSS instructors. Mirecki was re-enrolled in the RSS class, and on the day of his death, March 2, 1988, he was once again undergoing the rigors of the sharks and daisies drill. According to the plaintiff, at least two of the instructors on duty that day were aware of Mirecki's earlier problem with the drill. Once again, Mirecki had extreme difficulty with the drill and requested that he be dropped from the course and not be forced to re-enter the pool. Instead of honoring his request, the instructors seized him and forced him back in to the water, and began "smurfing" him—holding him under the water until he was unconscious and had turned blue. At this time, other recruits were commanded to line up, turn their backs and sing the national anthem. After being held under the water for a considerable length of time, Mirecki died from heart arrhythmia, ventricular fibrilation and decreased oxygen.

In addition to the foregoing facts surrounding Mirecki's death, the complaint alleged that for two months after Mirecki's death, the Navy maintained that his death was caused by accidental drowning. After hearing from other trainees who were present that day at the pool that the Navy was not revealing all the circumstances of Mirecki's death, the family contacted members of Congress and the press. After several inquiries from the press and members of Congress, the Navy finally admitted the circumstances surrounding Mirecki's death. On January 25, 1990, Mirecki's mother, Elaine Kitowski, as personal representative of his estate, filed this wrongful death action under the Federal Tort Claims Act in district court for the Southern District of Florida. She appeals from the judgment of dismissal.

II.

In *Feres* the Supreme Court held that the government "is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." 340 U.S. at 146, 71 S.Ct. at 159. *Feres* announced a judicially created immunity doctrine that had the effect of limiting

the general waiver of governmental immunity for torts established by the FTCA.

In applying *Feres*, this court has identified three factors to be considered in determining whether the particular activity of a member of a military service at the time of injury is "incident to service." These factors are: (1) the duty status of the service member, (2) the place where the injury occurred, and (3) the activity the serviceman was engaged in at the time of the injury." *Pierce v. United States*, 813 F.2d 349, 353 (11th Cir. 1987); *Parker v. United States*, 611 F.2d 1007, 1013 (5th Cir. 1980).[1] In this case the district court held, "the undisputed facts established that decedent was on active duty participating in training exercises at NAS when the fatal injury was inflicted, and thus such injuries were obviously incident to his duties in the USN."

III.

The plaintiff makes three arguments on appeal: (1) that her son had been effectively discharged at the time of his death; (2) that the Supreme Court has recognized an exception to the *Feres* doctrine where the conduct of military superiors is egregious; and (3) that *Feres* should be overruled.

A.

Turning to the third argument first, we clearly have no authority to overrule a decision of the Supreme Court. In *Feres*, Justice Jackson noted that if the Court had misinterpreted the FTCA, "at least Congress possesses a ready remedy." 340 U.S. at 138, 71 S.Ct. 155. In the more than forty years since *Feres*, Congress has not indicated that *Feres* misinterpreted the Act. Furthermore, the Supreme Court

[1]The Eleventh Circuit in *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc) adopted as precedents decisions of the former Fifth Circuit rendered prior to October 1, 1981.

has continued to apply *Feres* strictly when lower courts have sought to give the "doctrine" more elasticity in cases where the facts were different from those considered in *Feres*. See, *e.g.*, *United States v. Johnson*, 481 U.S. 681, 107 S.Ct. 2063, 95 L.Ed.2d 648 (1987); *United States v. Stanley*, 483 U.S. 669, 107 S.Ct. 3054, 97 L.Ed.2d 550 (1987). It is true that there now appears to be some support on the Supreme Court for overruling *Feres*. See Justice Scalia's dissent in *Johnson*, 481 U.S. at 692-703, 107 S.Ct. at 2069-2075. It seems clear, however, that a majority of the Justices do not agree at this time.

B

With respect to the first argument, the only conclusion can be that Mirecki was on active duty at the time he started RSS training again on March 2, 1988. He had not been discharged from the Navy or even transferred from the RSS program. If we assume that his oral request to "DOR" was effective to remove him from the program, he continued to be a navy serviceman until a decision was made either to discharge him or to transfer him to other duties. He could not effect his discharge unilaterally by merely withdrawing from the RSS program.

C.

In making his second argument—that there is an exception to *Feres* where egregious conduct causes an injury—the plaintiff contends that a careful reading of recent Supreme Court decisions supports her position. We disagree. Justice O'Connor, dissenting in *Stanley*, wrote that, in her view, "conduct of the type alleged" in this case is so far beyond the bounds of human decency that as a matter of law it simply cannot be considered a part of the military mission." 483 U.S. at 709, 107 S.Ct. at 3065. The conduct referred to was subjecting a soldier to medical experimentation without his knowledge or consent.

The Supreme Court considered *Stanley* only as a direct action for violation of constitutional rights as recognized in *Bivens v. Six*

Unknown Federal Narcotics Agents, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), not as an FTCA case. The majority in *Stanley*, however, did apply the *Feres* rationale and held that "no *Bivens* remedy is available for injuries that 'arise out of or are in the course of activity incident to service.'" 483 U.S. at 684, 107 S.Ct. at 3064. Thus, *Stanley* forecloses a direct *Bivens*-type action by a member of the military if the injury results from an activity incident to service. Justice O'Connor would hold that injury resulting from conduct "beyond the bounds of human decency" just cannot be considered "incident to service" because such conduct is not part of the military mission.

Presumably Justice O'Connor would apply the same reasoning to similar conduct in an FTCA case. Furthermore, Justices Marshall and Stevens, who joined Justice Brennan's dissent in *Stanley* on the ground that military discipline should not be a "special factor counselling hesitation" when a remedy is required for a constitutional violation, might agree to an "egregious conduct" exception to *Feres*. Nevertheless, a majority of the Supreme Court has not established such an exception and this court is powerless to do so.

IV.

Three separate appeals were decided in *Feres*. The common denominator of the cases was that a person on active duty had "sustained injury due to negligence of others in the armed forces." 340 U.S. at 138, 71 S.Ct. at 155. Although the instructors intentionally subjected Mirecki to "smurfing," his death resulted from their negligence in persisting in that exercise, not from the intention to kill him. The Supreme Court and the lower federal courts have wrestled with the application of the "doctrine" in numerous cases since it was announced. Despite the extreme circumstances surrounding Mirecki's death, we cannot escape the fact his death arose out of an activity incident to his military service. All three factors applied by this court in determining whether an activity is incident to service were present: Mirecki was on active duty; his death occurred on a Navy base; and he was engaged in a prescribed training exercise.

AFFIRM.